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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PALACIO DEL MAR HOMEOWNERS ASSOCIATION, INC.,

Plaintiff and Respondent,

v.

ARNOLD A. MCMAHON et al.,

Defendants and Appellants.

G039731

(Super. Ct. No. 01CC14684)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Clay M. Smith, Judge. Reversed and remanded with directions.

Arnold A. McMahon, in pro. per., for Defendant and Appellant.

Elizabeth J. McMahon, in pro. per., for Defendant and Appellant.

Peters & Freedman, Simon F. Freedman, David M. Peters, and Michael G. Kim for Plaintiff and Respondent.

Defendants Arnold A. McMahon (Arnold) and Elizabeth J. McMahon (Elizabeth) (collectively, the McMahons) failed to appear for trial.[1] They appeal from the resulting judgment for plaintiff Palacio Del Mar Homeowners Association, Inc. (Palacio). They contend they lacked notice of trial. They further contend Palacio was not entitled to recover compensatory or punitive damages on its fraudulent transfer cause of action.

The McMahons had adequate notice of trial and Palacio was entitled to recover compensatory damages, if any. But we reverse because those compensatory damages cannot include attorney fees that Palacio incurred prosecuting this action against the McMahons or against those who were joint tortfeasors with the McMahons. Furthermore, Palacio did not offer substantial evidence of the McMahons' ability to pay the punitive damage award. We remand for a retrial on compensatory damages.

FACTS[2]

Palacio sued the McMahons for fraudulently transferring property to prevent Palacio from enforcing a judgment against them. (See *Palacio Del Mar Homeowners Assn., Inc. v. McMahon* (Mar. 17, 2004, G028742 [nonpub. opn.]) (*Palacio I*) [affirming underlying judgment for Palacio]; see also *Palacio Del Mar Homeowners*

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[1] We respectfully use the McMahons' first names for clarity.

[2] All parties should know to prepare a complete record on appeal, given their extensive experience before this court. (See footnote 3, *infra*.) Each side fails far too often to support factual assertions with citations to the record on appeal in this case. As a result, we must review several issues based upon scant evidence, reasonable inferences, and the parties' concessions. We may do so, though we would rather not be forced into it. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 ["Inferences may constitute substantial evidence"]; *Mangini v. Aerojet-General Corp*. (1991) 230 Cal.App.3d 1125, 1152 [""a reviewing court may make use of statements [in briefs] as admissions against the party""].) The McMahons' propria persona status does not excuse them from basic appellate practice rules. Palacio has even less excuse.

Assn., Inc. v. McMahon (May 31, 2005, G034741 [nonpub. opn.]) (*Palacio II*) [noting commencement of this action].)[3]

In July 2007, Arnold served Palacio with a notice of ruling indicating the court had set trial for September 10, 2007. Three weeks before trial, Elizabeth filed a motion to change venue with a hearing date in October 2007. The court granted Palacio's ex parte application to advance the hearing on the venue motion to a pretrial date. The court heard and denied the venue motion on September 7, 2007.

The McMahons failed to appear for trial on September 10, though Palacio's counsel informed them that day by fax that trial was proceeding. The court admitted evidence and heard argument from Palacio. It entered judgment for Palacio, awarding it just over $570,000 in compensatory damages, $250,000 in punitive damages, and an unspecified amount of attorney fees and costs. The McMahons filed a motion to set aside the judgment, which the court denied.

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[3] This appeal is *Palacio VI*. It follows *Palacio Del Mar Homeowners Assn., Inc. v. McMahon* (Aug. 24, 2006, G036287 [nonpub. opn.]) (*Palacio III*) (affirming denial of Arnold's anti-SLAPP motion and sanctioning him for taking a frivolous appeal); *Palacio Del Mar Homeowners Assn., Inc. v. McMahon* (May 23, 2008, G038622 [nonpub. opn.]) (*Palacio IV*) (affirming Palacio's award of attorney fees incurred on Arnold's anti-SLAPP motion); and *Palacio Del Mar Homeowners Assn., Inc. v. McMahon* (Aug. 25, 2008, G039245 [nonpub. opn.]) (*Palacio V*) (dismissing McMahons' moot appeal from order issuing writ of execution to Palacio and sanctioning them and Elizabeth's counsel). Other related appeals include *Peters & Freedman v. McMahon* (Feb. 14, 2008, G037871 [nonpub. opn.] (affirming denial of McMahons' anti-SLAPP motion to strike Palacio's counsel's libel complaint), *Pratt v. McMahon* (Feb. 14, 2008, G038236 [nonpub. opn.] (same), and *Vithlani v. McMahon* (July 24, 2008, G038909) [nonpub. opn.] (affirming judgment for Arnold's former counsel on (1) his complaint to recover on unpaid legal bills in this action, and (2) Arnold's cross-complaint for legal malpractice).

DISCUSSION

The McMahons Had Sufficient Notice of Trial

The McMahons contend they lacked notice of the September 10 trial date, even though Arnold had given notice of the trial date to Palacio months before. They assert Elizabeth's venue motion vacated the scheduled trial date and required the court to set a new one. They rely upon *Pickwick Stages System v. Superior Court* (1934) 138 Cal.App. 448 (*Pickwick*), which held the filing of a motion for change of venue "operates as a *supersedeas* or stay of proceedings, and must be disposed of before any other steps can be taken." (*Id*. at p. 449.) But *Pickwick* does not suggest a venue motion wipes the trial calendar clean, requiring the court to reschedule the entire case. Moreover, the court denied the motion three days before trial.

On that issue, the McMahons contend they could not know trial would start as scheduled because they lacked notice the court had denied the venue motion. They concede they failed to attend the September 7 hearing on the venue motion, even though Elizabeth had notice of that hearing date and filed a written opposition. They offer no excuse for their absence, other than their unreasonable belief the venue motion deprived the court of jurisdiction to advance the hearing date. They blame Palacio for failing to serve them with written notice of the ruling on the venue motion. They again rely upon *Pickwick*.[4] But that case does not purport to bar courts from advancing hearing dates on venue motions, nor does it excuse parties from appearing for scheduled trials after their venue motions are denied. The McMahons were not entitled to a new notice of trial

[4] We have since disabused the McMahons of the notion they may seek to change venue based on the trial judge's alleged bias, rather than simply moving to disqualify the judge. (*Vithlani v. McMahon, supra,* G038909 [venue change rules "do[] not apply to allegations of judicial bias"].)

(Code Civ. Proc., § 594, subd. (b)),[5] contrary to their claim, because the court did not set a new trial date. It simply held the trial on the scheduled date. No additional notice was required.[6]

Palacio Is Entitled To Recover Compensatory Damages

As a threshold issue, the McMahons contend compensatory damages are wholly unavailable in a fraudulent transfer action. They rely upon California's enactment of the Uniform Fraudulent Transfer Act (UFTA), which authorizes the court to award "[a]ny other relief the circumstances may require" for a fraudulent transfer (Civ. Code, § 3439.07, subd. (a)(3)(C)), "[s]ubject to applicable principles of equity . . . ." (Civ. Code, § 3439.07, subd. (a)(3).) They contend the court was limited to awarding equitable relief, not monetary damages.

Jurisdictions differ on whether the UFTA's provision for "other relief" allows recovery of compensatory damages and, if it does, what those damages may comprise. (Barondes, Fiduciary Duties in Distressed Corporations: Second-Generation Issues (2007) 1 J. Bus. & Tech. L. 371, 384 & fn. 40 [discussing split of authority]; *Forum Ins. Co. v. Devere Ltd*. (C.D.Cal. 2001) 151 F.Supp.2d 1145, 1148 & fn. 7 [same, and assuming California follows majority rule barring damages].) California courts have not addressed the debate expressly. But contrary to *Forum*, our courts assume the UFTA allows some form of compensatory damages. (See *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 837 (*Filip*) [plaintiff sufficiently alleged damages supporting conspiracy claim by alleging it incurred attorney fees due to fraudulent transfers, but see

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[5] All further statutory references are to the Code of Civil Procedure unless otherwise stated.

[6] The McMahons further contend they were wrongly deprived of a jury trial, although they timely requested one and deposited jury fees. Even if so, they waived the right to a jury trial by failing to appear at trial. (§ 631, subd. (d)(1).)

discussion on p. 10]; see also *id*. at pp. 839-840 [court had jurisdiction to enter money judgment equal to underlying judgment]; *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1676-1677 [reversing punitive damages award where jury awarded zero dollars in compensatory damages for fraudulent transfer, implying jury could have awarded compensatory damages in some amount].) Given the sparse record and briefing on this issue, we conclude the UFTA does not categorically preclude an award of compensatory damages for fraudulent transfer.[7] We will discuss later what those damages may comprise.

We also reject the McMahons' contention they lacked notice of the potential compensatory damages award. They state Palacio failed to demand a specific amount of damages in the complaint. (§ 425.10, subd. (a)(2) ["If the recovery of money or damages is demanded, the amount demanded shall be stated"].) Palacio concedes its misstep, but contends it is immaterial. "[T]he specific dollar amount is necessary only when a default judgment is to be entered. The purpose of such a requirement is to ensure that the defendant is sufficiently aware of the consequences of not answering the complaint. [Citation.] However, 'in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue.' [Citation.] Hence, the absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief." (*Furia v. Helm* (2003) 111 Cal.App.4th 945, 957 (*Furia*).)

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[7] We are not persuaded otherwise by Palacio's counsel's statement below, "In essence, this is an equitable action in a uniform fraudulent transfer case." Counsel made this statement while presenting an alternative argument for its motion in limine to strike the McMahons' jury demand, and the court apparently relied upon other grounds in granting the motion. (See *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 558 [party judicially estopped only when court adopts their claim]; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752 [judicial admission binding only when counsel addresses the "matter then at issue"].)

The McMahons answered the complaint and make no coherent claim that compensatory damages are inconsistent with it. They assert they are not liable for fraudulent transfer because they eventually satisfied the underlying judgment, and did so before Palacio incurred the bulk of its alleged damages. This unsupported claim misapprehends the applicable pleading standard — the compensatory damages must be consistent with the complaint's allegations. (*Furia*, *supra*, 111 Cal.App.4th at p. 957.) The McMahons challenge the complaint's merits, not its allegations. They could have presented this defense at trial, had they shown up.

In addition to the pleading requirements, due process requires the McMahons have notice of the scope of the potential liability they faced. (*Garamendi v. Golden Eagle Ins. Co*. (2004) 116 Cal.App.4th 694, 705-706.) "If the eventual judgment exceeded the amount that [the McMahons] had been given notice was at risk in the litigation, the constitutional mandate of due process would void the excess, even if . . . section 580 did not. [Citation.] [¶] The fact that the precise amount of the requested damages was not specified in the complaint does not mean that the resulting judgment necessarily resulted in a deprivation of due process of law. The key elements of procedural due process are notice and an opportunity to be heard." (*Ibid*.) Discovery and other litigation steps can provide the requisite notice. (*Id*. at pp. 706-707.) Palacio asserts it informed the McMahons in June 2007 it sought "'*in excess* of $430,000 in attorney fees and costs in this UFTA action.'" In apparent confirmation, the McMahons concede they "knew by June 2007 that [Palacio] was asking for humungous attorney fees." While the compensatory damages award of $570,000 exceeds the $430,000 demanded in June 2007, the McMahons had adequate notice of the award's potential magnitude.

Palacio May Not Recover Attorney Fees Incurred Prosecuting This Fraudulent Transfer Action Against the McMahons As Compensatory Damages

Even though Palacio generally may seek to recover compensatory damages for fraudulent transfer, it still must prove the specific damages it seeks. Palacio's counsel conceded at oral argument the $540,000 compensatory damages award consists of attorney fees and costs incurred in this action against the McMahons. He claimed Palacio incurred approximately $30,000 to $40,000 of the fees and costs to enforce the underlying judgment, which he conceded the McMahons had satisfied long ago. Palacio incurred the other half-million dollars in fees and costs in maintaining this action after the judgment was satisfied. He noted the transferees were also defendants in this action at some point, though Palacio had settled with them and dismissed them.

Palacio cannot recover their attorney fees as compensatory damages. "California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees." (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.) "Except as attorney's fees are *specifically* provided for by statute, the measure and mode of compensation . . . is left to the agreement, express or implied, of the parties." (§ 1021, italics added.) The UFTA does not "specifically provide[] for" recovery of attorney fees incurred prosecuting the fraudulent transfer claim.[8] (§ 1021.) At most, it authorizes "[a]ny other relief the circumstances require,"

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[8] (Accord *Gardiner v. York* (Utah Ct.App. 2006) 153 P.3d 791, 795 (*Gardiner*) ["the UFTA contains no fee provision"]; *Volk Construction Co. v. Wilmescherr Drusch Roofing Co*. (Mo.Ct.App. 2001) 58 S.W.3d 897, 901 [UFTA provides "no express statutory authorization . . . for the award of attorney's fees," but allowing fees pursuant to common law "'special circumstances'" exception]; *Morris v. Askeland Enterprises, Inc*. (Col.Ct.App. 2000) 17 P.3d 830, 833 [UFTA does not authorize recovery of attorney fees]; *Selvage v. J.J. Johnson & Associates* (Utah Ct.App. 1996) 910 P.2d 1252, 1264 [the plaintiff's "'creditor claim' is the amount owed by [the defendant] under the three contracts, including the attorney fees incurred to enforce those contracts, but not fees to enforce any rights under the U.F.T.A."]; *Golconda Screw, Inc. v. West Bottoms Ltd*. (Kan. App. 1995) 894 P.2d 260, 266 [UFTA does not authorize recovery of attorney fees]; *Spanier v. U.S. Fidelity & Guaranty Co*. (Ariz.Ct.App. 1980) 623 P.2d 19, 28-30 [cross-claimant's "bald statement that attorneys' fees are recoverable

"[s]ubject to the applicable principles of equity and in accordance with applicable rules of civil procedure." (Civ. Code, § 3439.07, subd. (a)(3)(C).) The "applicable rules of civil procedure" include the American rule codified at section 1021. Thus, the UFTA does not authorize Palacio to recover its attorney fees incurred in this action.

At oral argument, Palacio's counsel relied upon the "tort of another" doctrine.[9] This doctrine allows "[a] person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person" to recover "reasonably necessary . . . attorney's fees[] and other expenditures thereby suffered or incurred." (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620 (*Prentice*).) Attorney fees are properly awarded as "damages wrongfully caused by defendant's improper actions." (*Id.* at p. 621; accord *Gardiner*, *supra*, 153 P.3d at p. 795 [affirming attorney fees award in UFTA action pursuant to "third-party litigation" exception].)

The tort of another doctrine does not, however, permit recovery of attorney fees spent on litigation against the same party from which the fee award is sought. (*Prentice*, *supra*, 59 Cal.2d at p. 620.) The doctrine applies only to attorney fees incurred "bringing . . . an action against a third person." (*Ibid.*; accord *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1302-1303 (*Golden West*) [doctrine inapplicable where plaintiff sought to recover against principal for attorney fees incurred against

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in every fraudulent conveyance case is certainly not borne out by its citations of authority"].)

[9] After oral argument, we granted leave to the parties to file letter briefs concerning Palacio's entitlement to recover attorney fees. Palacio invoked the UFTA's plain language and the tort of another doctrine. It also cited section 685.040, which allows a plaintiff to recover attorney fees incurred in enforcing a judgment that included an award of attorney fees pursuant to contract. The procedures for asserting such a claim are set forth in section 685.080; those procedures were not followed here. Palacio did not assert any contractual authorization to recover attorney fees.

agent — only one true party involved].) Otherwise, attorney fees could be recovered in every civil action.

Nor does the doctrine allow a plaintiff to recover attorney fees against joint tortfeasors on the ground "one defendant's conduct caused the plaintiff to pursue an action against the other." (*Electrical Electronic Control, Inc. v. Los Angeles Unified School District* (2005) 126 Cal.App.4th 601, 617.) "The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney fee damages." (*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34, 57 (*Vacco*); but see *Filip*, *supra*, 129 Cal.App.4th at p. 837.)

Thus, the tort of another doctrine does not allow Palacio to recover *from* the McMahons any attorney fees incurred prosecuting the UFTA claim *against* the McMahons. (*Prentice*, *supra*, 59 Cal.2d at p. 620; *Golden West*, *supra*, 232 Cal.App.3d at pp. 1302-1303.) Nor does it allow Palacio to recover from the McMahons any attorney fees incurred prosecuting UFTA claims against any transferees who are joint tortfeasors. (*Vacco*, *supra*, 5 Cal.App.4th at p. 57.) On the other hand, the tort of another doctrine would allow Palacio to recover from the McMahons any attorney fees reasonably incurred to recover property fraudulently transferred to third parties who are not joint tortfeasors; i.e., innocent transferees. (*Prentice*, *supra*, 59 Cal.2d at p. 620.)

We therefore reverse the compensatory damages award. We remand for retrial, in which Palacio will have the opportunity to try to show the existence and amount of its proper compensatory damages, if any.

Palacio May Not Recover Punitive Damages

Finally, the McMahons attack the punitive damages award on the ground Palacio did not introduce any evidence of their ability to pay. "[E]vidence of a defendant's financial condition is essential to support an award of punitive damages [and] the plaintiff bear[s] the burden of proof on the issue." (*Adams v. Murakami* (1991) 54

Cal.3d 105, 119 (*Adams*).) "[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains *meaningful evidence* of the defendant's financial condition." (*Id*. at p. 109, italics added.) "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Id*. at p. 112.) Thus, "a punitive damages award is excessive if it is *disproportionate* to the defendant's ability to pay." (*Ibid*., italics added; see also *id*. at pp. 112-113 [citing cases reversing punitive damages awards exceeding 33, 30, and 15 percent of the defendant's net worth].) And accordingly, "there should be some evidence of the [McMahons'] actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*).)

We cannot determine whether the punitive damages award is proportional to the McMahons' ability to pay because Palacio offered no "meaningful evidence" of their present financial condition. (*Adams*, *supra*, 54 Cal.3d at p. 109.) Palacio notes it read into evidence excerpts from Arnold's deposition transcript, in which Arnold stated he sold two properties in 2000 for $487,000 and $430,000 and owned a house appraised in 2004 at $935,000. But Palacio failed to offer evidence of the McMahons' *current* income, expenses, assets, or liabilities. It points to no evidence of what the McMahons paid for their properties, whether the properties were encumbered, what was their tax liability on the sales, or whether the McMahons still have any of the sales' proceeds.

Palacio thus failed to sufficiently show the McMahons' ability to pay punitive damages. On this issue, Palacio had "'a full and fair opportunity to present [its] case for punitive damages,'" barring any retrial. (*Baxter*, *supra*, 150 Cal.App.4th at p. 681; accord *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919-920.)

DISPOSITION

The judgment is reversed. The matter is remanded with directions to conduct a new trial limited to the issue of determining Palacio's compensatory damages, if any. In the interests of justice, the parties shall bear their own costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.